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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TODD VANDEHEY, an individual,

Plaintiff,

v.

REAL SOCIAL DYNAMICS, INC., a Nevada
corporation; NICHOLAS KHO, an individual;
OWEN COOK, an individual; John Does 1
through 10, all whose true names are unknown;
ABC Companies 1 through 10, all whose true
names are unknown.

Defendants.

CASE NO.: 2:17-cv-02230-JAD-NJK

**PLAINTIFF'S REPLY IN FURTHER
SUPPORT OF THE MOTION FOR
SUMMARY JUDGMENT AS TO COUNT
ONE OF THE AMENDED COMPLAINT**

**PLAINTIFF'S REPLY IN FURTHER SUPPORT OF THE MOTION FOR
SUMMARY JUDGMENT AS TO COUNT ONE OF THE AMENDED COMPLAINT**

Plaintiff Todd VanDeHey ("Plaintiff") hereby files this reply in further support of Plaintiff's Motion for Summary Judgement as to Count One of the Amended Complaint for a Declaratory Judgement Pursuant to 28 U.S.C. 2201 ("Declaratory Judgment Act") and Fed. R. Civ. Pro. 57 determining that the Non-Competition and Non-Solicitation Clauses of the July 27,

2004 independent contractor agreement (“Contractor Agreement”) between Plaintiff and defendant Real Social Dynamics, Inc. (“Defendant RSD”) are Void and Unenforceable (“Motion”).

MEMORANDUM OF POINTS AND AUTHORITIES

LEGAL ARGUMENT

POINT ONE

A. DECLARATORY JUDGMENT IS THE PROPER VEHICLE TO DETERMINE THE ENFORCEABILITY OF THE NON-COMPETITION AND NON-SOLICITATION CLAUSES IN THE CONTRACTOR AGREEMENT.

Defendants take the absurd position that because neither party has breached the Contractor Agreement dated July 27, 2004 between Plaintiff and Defendant RSD (“Contractor Agreement”), nor alleged a breach of the Contractor Agreement, that a declaratory judgment is improper. That is exactly the opposite of what the law says. The purpose of a declaratory judgment is to address a breach for which damages would depend on future, contingent events. *United Nat. Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1114 (9th Cir. 2001).

Indeed, courts have adjudicated declaratory actions to determine the enforceability and existence of non-competition agreements, such as the one disputed herein. *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403 (1981); *Gress v. Conover Ins., Inc.*, 2011 WL 4352316 (E.D. Wash. Sept. 16, 2011), *aff’d*, 494 F. App’x 772 (9th Cir. 2012). Clearly, the court is empowered under the Declaratory Judgment Act to adjudicate the enforceability of the Non-Competition and Non-Solicitation Clauses under the Contractor Agreement, as that is exactly the purpose of the Act.

POINT TWO

B. THE NON-COMPETITION AND NON-SOLICITATION CLAUSES ARE OVERLY BROAD AND MADE FOR AN IMPERMISSIBLE PURPOSE, THEREFORE THEY ARE VOID AND UNENFORCEABLE.

The purpose of non-compete and non-solicitation clauses is to protect a business’ proprietary or important business interests. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 166 (Hardesty, J., dissenting) (*citing Traffic Control Servs., Inc. v.*

1 *United Rentals Nw., Inc.*, 120 Nev. 168, 172 (2004)). In their opposition brief, Defendants admit
 2 that they seek to enforce the Non-Competition and Non-Solicitation Clauses for the
 3 impermissible purpose of allowing RSD to recoup losses before Plaintiff begins work, rather
 4 than to protect proprietary or important business interests:

5 Thus, RSD will incur losses from no longer promoting Vandehey [sic] or selling
 6 his products, because it will take a substantial amount of time to build a new brand
 around a new instructor.

7 ECF No. 46 at 7:5-6.

8 Also, for this reason, revision of the Non-Competition and Non-Solicitation Clauses
 9 would be futile. The language of the Non-Competition Clause prevents Plaintiff from being
 10 “directly or indirectly involved” with a company in “direct competition” with Defendant RSD.
 11 How is the Court to determine the intent of the parties from being “indirectly involved” with a
 12 company in “direct competition” with Defendant RSD? Does the clause prevent the Plaintiff
 13 from making an appearance at another date coaching company, but not providing any
 14 instruction? Does the clause prevent the Plaintiff from talking to owners of other date coaching
 15 companies? There is no way to know unless Plaintiff were to file a declaratory judgment for each
 16 and every action he intended to take over the next five years. The point is this: the language of
 17 the Non-Competition Clause could mean a multitude of things, and the intent of the parties
 18 cannot be gleaned from it. Clearly such overly broad restrictions are unreasonable.

19 Moreover, the plain language of Non-Competition Clause impermissibly prohibits
 20 Plaintiff from working in the date coaching industry in any capacity.

21 The Contractor [Plaintiff] will not ***own, operate or work for a company or***
 22 ***internet website*** that teaches men how to be successful with women and dating,
 23 for five (5) years from the date of termination or expiration, in Los Angeles, New
 York, San Francisco, Sydney, Melbourne, Toronto, Montreal, and London...

24 ECF No. 41, Exhibit A, Contractor Agreement at ¶¶ 25-27; emphasis added.

25 Prohibiting the employment of a former employee from the same industry in any capacity
 26 is overly broad and unreasonable. *Golden Rd.*, 376 P.3d at 155.

27 ...

28 ...

1 Indeed, Defendants agree that if the Contractor Agreement prohibits Plaintiff from
2 working in the dating coaching industry in any capacity—as the Contractor Agreement
3 undeniably does—then it would be overly broad.

4 Had the contract restricted Plaintiff from working in any business involving
5 dating, then such a restricting would likely be overbroad.

6 ECF No. 46 at 7:24-25. In essence, Defendants have conceded that the language of the
7 Contractor Agreement is overbroad, and thus, void and unenforceable.

8 Furthermore, the Non-Competition Clause extends to the world, not just eight major
9 cities, as Defendants incorrectly state in their responsive brief. Defendants fail to acknowledge
10 that the Non-Competition Clause not only prohibits Plaintiff from working in eight major cities,
11 but also any Internet website that operates in those cities. Effectively, this is a worldwide
12 prohibition against Plaintiff from working in the dating coaching industry, as any company
13 operating an Internet website essentially operates in one of those eight cities.

14 Defendants also misstate the law regarding how enforcement of the Non-Competition and
15 Non-Solicitation Clauses is appropriate based on the reason for the termination of the parties'
16 relationship. Defendants assert that since they terminated Plaintiff based on the yet to be proven
17 allegations that he embezzled and converted funds, the Court should not hesitate to enforce a
18 non-compete. However, that is not what the law Defendants rely on says. In their brief,
19 Defendants state:

20 Where the application of the non-compete provisions results from the desire of an
21 employee to end his relationship with his employer rather than from any
 wrongdoing by the employer, a court should be hesitant to find undue hardship.

22 ECF No. 46, p. 8.

23 That is the opposite of Defendants' position. Plaintiff did not terminate his contract with
24 Defendants. Defendants terminated Plaintiff based on their mere allegations of wrongdoing. In
25 addition, Plaintiff not only denies Defendants' allegations of embezzlement and conversion, but
26 has asserted that Defendants are the ones who converted funds from Plaintiff. Thus, the
27 termination of the relationship between the parties was not because of Plaintiff's desire to end the
28 relationship. Instead, Defendants are the ones who effectively terminated the relationship.

1 Plaintiff did not bring any undue hardship upon himself in this matter; the hardship has been
2 caused by the overly broad and unreasonable Non-Competition and Non-Solicitation Clauses.
3 The law cited by Defendants is inapplicable to the validity and enforcement of the Non-
4 Competition and Non-Solicitation Clauses.

5 In sum, the Non-Competition and Non-Solicitation Clauses are overly broad and
6 unreasonable. Therefore, they should be deemed void and unenforceable.

7 **POINT THREE**

8 **C. THE ARBITRATION PROVISION OF THE**
9 **OPERATING AGREEMENT DOES NOT APPLY TO A**
10 **DISPUTE BETWEEN THE PARTIES RELATED TO THE**
11 **CONTRACTOR AGREEMENT.**

12 Defendants fail to cite any precedent that the arbitration provision of the Operating
13 Agreement dated October 5, 2015 would apply to a dispute under the Contractor Agreement.
14 Instead, Defendants attempt to argue that Plaintiff's Motion is not ripe for adjudication by this
15 Court. As indicated above, that could not be further from what the law says. A declaratory
16 judgment is proper. *See* Point I, *supra.*; *see also* ECF No. 42, Point I.

17 As indicated in Plaintiff's Motion for Summary Judgment as to Count One of the
18 Amended Complaint, the Contractor Agreement and Operating Agreement are separate and
19 distinct. ECF No. 42, Point IV.

20 Moreover, NRS 597.995 indicates that "a provision which requires a person to submit to
21 arbitration any dispute...must include specific authorization for the provisions which indicated
22 that the person has affirmatively agreed to the provision". NRS 597.995. Otherwise, "the
23 provision is void and unenforceable". *Id.* The Contractor Agreement contains no such specific
24 authorization provision. Therefore, any dispute arising under the Contractor Agreement cannot
25 be submitted to arbitration as arising out of or related to the Operating Agreement and the Court
26 has jurisdiction to adjudicate this matter.

27 ...

28 ...

...

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant the relief requested herein, together with such other, further and different relief as the Court deems just, equitable and proper under the circumstances.

RESPECTFULLY SUBMITTED this 22nd day of November, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 22nd day of November, 2017, a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN FURTHER SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT AS TO COUNT ONE OF THE AMENDED COMPLAINT** was electronically filed with the Clerk of the Court by using CM/ECF service which will provide copies to all counsel of record registered to receive CM/ECF notification.

/s/ Jelena Jovanovic

An employee of McDonald Carano LLP